A

PP v. SOH CHEW THONG & ANOR AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
ZAKARIA SAM JCA
B AHMADI ASNAWI JCA
[CRIMINAL APPEALS NO: P-05-114-04-2013
& P-05-84-04-2014]
17 FEBRUARY 2016

C ***CRIMINAL LAW:*** *Penal Code – Section 302 – Murder – Domestic maid – Abused and neglected by employers – Deprived of food and water and starved to death – Whether conduct of employers could amount to murder – Reduction of charge to culpable homicide not amounting to murder – Whether unwarranted – Whether employers guilty of murder*

D The deceased in this case was a Cambodian national and was employed by the husband-and-wife respondents ('the accused') as their domestic maid. Before the learned judge below, to support the charge of murder under s. 302 of the Penal Code against the accused, the prosecution adduced evidence: (i) that the deceased had been subjected to multiple physical abuse and E prolonged deprivation of food and water by the accused; (ii) that for the eight months that she was working for the accused her weight had tumbled from 44kg to a mere 17kg at the time of her death; (iii) that she was starving and was seen to have scavenged for leftover food from the rubbish bin; (iv) that medical evidence showed that death was due to acute peritonitis F resulting from gastric ulcer which in turn was associated with abuse and neglect; and (v) that despite the deceased's dire medical conditions, the accused had never even for once sought medical treatment for her. The evidence of the prosecution notwithstanding, the learned judge ruled that the prosecution had only made out a case of culpable homicide not amounting G to murder under s. 304(a) of the Penal Code, and in consequence convicted the accused under the said section and sentenced them to 24 years' jail each. It was the view of the judge that on the facts and in the circumstances, death was only 'the likely result' and not 'the most probable result' of the conduct of the two accused. Both the prosecution and the defence appealed against the decision and the primary issue that arose was whether the learned trial judge H was wrong both on facts and in law in amending the charge to the lesser offence, and consequently in not convicting the accused for murder.

Held (allowing prosecution's appeal; convicting both accused persons for murder and sentencing them to death)

I **Per Zakaria Sam JCA delivering the judgment of the court:**

(1) The evidence of PW6 and PW7 showed that the deceased did not get sufficient food, was neglected and had suffered from injuries repeatedly over a period of time. Even the second accused (the wife) admitted that

the deceased had scavenged for food. The reasonable inference in the circumstances was that the deceased was very hungry and had been deprived of food. Starvation therefore had been proved, which the accused failed to rebut. (paras 35-38 & 41-43)

(2) Looking at the horrific physical condition of the deceased as per photographs exhibited, the second accused's evidence that she did not take the deceased to see a doctor because the deceased said she had no problem with her health was doubtful. With the full knowledge that the welfare of the deceased was their responsibility, it is beyond apprehension that the accused were still reluctant to bring the deceased to see a doctor whose clinic was close by. (para 50)

(3) It had been proved that the deceased was in a worst condition towards the end of her life. Indeed, as testified by PW6, she could not even move. In the words of the said pathologist 'terdapat juga kesan kecederaan yang baru; saya berpendapat si mati telah menderita akibat 'acute peritonitis' yang menyebabkan beliau sudah pasti tidak dapat bergerak kerana kesakitan; beliau masih lagi dipukul atau didera hingga menyebabkan terdapat luka-luka baru pada anggota beliau'. Obviously, the second accused was lying in her police report when she reported that on 31 December 2012 the deceased was still taking her bath when she sent up her dinner to her at about 8pm. Also, by not sending the immobilised deceased for medical treatment, they were also guilty of illegal confinement. (paras 61-63)

(4) It was true that the second accused was in charge of the household and played a much more active role in it than the first accused. However, since the first accused was in the house every day, he must be aware of the deceased's condition. The evidence established that the first accused was aware of and participated in the deceased's mistreatment and confinement. (para 69)

(5) This is a clear case of the accused failing to perform their legal duty to provide the basic necessities of life, including food and medical care to the deceased. The abuse and neglect, which occurred over a number of months on a daily basis and included starvation, and the failure to attend to basic medical and hygienic needs, compelled the conclusion that the accused knew that their abuse and neglect of the deceased had caused her bodily harm, and without medical intervention the deceased's death was imminently probable. The accused's conduct was of a nature that readily permits the inference that they knew that their conduct was so imminently dangerous as would probably bring about the deceased's death, and yet they chose to persist in it. (paras 84 & 87)

Bahasa Malaysia *Headnotes*

Si mati dalam kes ini adalah seorang warga Kemboja yang bekerja sebagai pembantu rumah dengan pasangan suami isteri responden-responden ('tertuduh'). Di hadapan yang arif hakim di bawah, bagi menyokong tuduhan bunuh di bawah s. 302 Kanun Keseksaan terhadap tertuduh, pendakwaan telah mengemukakan keterangan: (i) bahawa si mati telah didera dengan pelbagai cara dan tidak diberi makan dan minum untuk masa yang berpanjangan oleh tertuduh; (ii) bahawa untuk tempoh lapan bulan si mati bekerja dengan tertuduh, berat badan si mati telah turun mendadak daripada 44kg kepada hanya 17kg semasa kematiannya; (iii) bahawa si mati telah kebuluran dan dilihat menggeledah makanan dari tong sampah; (iv) bahawa keterangan perubatan menunjukkan bahawa kematian disebabkan oleh 'acute peritonitis resulting from gastric ulcer' yang berpunca dari penderaan dan pengabaian; dan (v) walaupun keadaan kesihatan si mati sudah sebegitu teruk, tertuduh tidak pernah sekalipun membawa si mati berjumpa doktor untuk mendapatkan rawatan. Walaupun dengan keterangan-keterangan pendakwaan ini, yang arif hakim memutuskan bahawa pendakwaan hanya membuktikan suatu kes homisid salah yang tidak terjumlah kepada pembunuhan di bawah s. 304(a) Kanun Keseksaan, dan berikutnya mensabitkan tertuduh di bawah seksyen tersebut dan menjatuhkan hukuman 24 tahun penjara ke atas mereka masing-masing. Adalah menjadi pandangan yang arif hakim bahawa berdasarkan fakta dan hal keadaan kes, kematian adalah 'the likely result' dan bukannya 'the most probable result' daripada perbuatan tertuduh. Kedua-dua pendakwaan dan pembelaan merayu dan isu utama yang berbangkit adalah sama ada yang arif hakim bicara khilaf di sisi fakta dan undang-undang dalam meminda pertuduhan kepada pertuduhan yang lebih ringan, dan kerana tidak mensabitkan tertuduh dengan kesalahan bunuh.

Diputuskan (membenarkan rayuan pendakwaan; mensabitkan tertuduh atas kesalahan bunuh dan menjatuhkan hukuman mati)
Oleh Zakaria Sam HMR menyampaikan penghakiman mahkamah:

(1) Keterangan PW6 dan PW7 menunjukkan bahawa si mati tidak mendapat makanan yang secukupnya, diabaikan dan mengalami kecederaan demi kecederaan untuk satu tempoh. Tertuduh kedua (si isteri) malah mengakui bahawa si mati telah menggeledah sampah untuk mencari makanan. Dalam hal keadaan yang wujud, inferens munasabah adalah bahawa si mati mengalami kelaparan yang amat sangat kerana tidak diberi makanan. Fakta kebuluran dengan itu dibuktikan dan gagal disangkal oleh tertuduh.

(2) Melihat keadaan fizikal si mati yang mengerikan menerusi gambar-gambar yang diekshibitkan, keterangan tertuduh kedua bahawa dia tidak membawa si mati menemui doktor kerana si mati berkata dia tidak mempunyai apa-apa masalah kesihatan adalah diragui. Dengan

pengetahuan bahawa kesihatan si mati adalah tanggungjawab mereka, sukar dipercayai bahawa tertuduh masih enggan membawa si mati berjumpa doktor di klinik yang hanya berdekatan.

(3) Terbukti bahawa si mati berada dalam keadaan yang sangat dahsyat semasa akhir hayatnya. Malah, seperti yang dikatakan oleh PW6, dia sudah tidak mampu bergerak. Dalam kata-kata ahli patologi tersebut 'terdapat juga kesan kecederaan yang baru; saya berpendapat si mati telah menderita akibat 'acute peritonitis' yang menyebabkan beliau sudah pasti tidak dapat bergerak kerana kesakitan; beliau masih lagi dipukul atau didera hingga menyebabkan terdapat luka-luka baru pada anggota beliau'. Jelas bahawa tertuduh kedua berbohong dalam laporan polisnya apabila beliau melaporkan bahawa pada 31 Disember 2012 si mati masih mampu mandi apabila beliau menghantar makanan pada jam lebih kurang 8 malam. Selanjutnya, dengan tidak menghantar si mati yang sudah kaku untuk rawatan, tertuduh juga bersalah melakukan penahanan tidak sah.

(4) Memang betul bahawa tertuduh kedua yang mengendalikan rumah tangga dan memainkan peranan yang lebih aktif berbanding tertuduh pertama. Walaupun begitu, oleh kerana tertuduh pertama berada di rumah pada setiap hari beliau seharusnya menyedari tentang keadaan si mati. Keterangan membuktikan bahawa tertuduh pertama bukan sahaja menyedari tetapi turut terlibat dalam penderaan dan penahanan si mati.

(5) Ini adalah satu kes jelas di mana tertuduh gagal melaksanakan tanggungjawab undang-undang mereka untuk membekalkan keperluan-keperluan asas termasuk makanan dan penjagaan perubatan kepada si mati. Penderaan dan pengabaian itu, yang berlaku pada setiap hari untuk beberapa bulan, dan termasuk menyebabkan kebuluran dan tidak menghiraukan tentang penjagaan kesihatan si mati, membawa kepada konklusi bahawa tertuduh tahu bahawa penderaan dan pengabaian yang mereka buat terhadap si mati akan menyebabkan kecederaan badan kepada si mati, di mana, tanpa rawatan perubatan, akan menyebabkan kematian. Tindakan dan perbuatan tertuduh adalah sebegitu rupa sehingga inferens boleh dibuat bahawa mereka mengetahui bahawa tindakan dan perbuatan mereka adalah sebegitu merbahaya sehingga boleh menyebabkan kematian si mati, namun mereka masih juga meneruskannya.

Case(s) referred to:
R v. EB (2011) OJ No 1042 ***(refd)***
Tan Kim Ho & Anor v. PP [2009] 3 CLJ 236 FC ***(refd)***
Yeap Boon Hai v. PP [2010] 2 CLJ 405 FC ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 60(1)(b)
Penal Code, ss. 32, 36, 43, 300, 302, 304(a), 304A

Other source(s) referred to:
Ratanlal and Dhirajlal, *The Law of Crimes*, 24th edn, vol 2, p 1240

For the appellants - Ghazi Ishak (K Kumarendran, Naizatul Zamrina Karizaman & B Jeyasingam with him); M/s Ghazi & Lim
For the respondent - Lailawati Ali; DPP

[Editor's note: Appeal from High Court, Georgetown; Criminal Trial No: 45-32-09-2012 (overruled).]

Reported by Wan Sharif Ahmad

JUDGMENT

Zakaria Sam JCA:

Introduction

[1] For the purpose of these appeals, the accused Soh Chew Thong and Chin Chui Ling would be referred to as the first and second accused, respectively and the accused collectively.

The Charge

[2] The accused were initially charged under s. 302 of the Penal Code (PC) for the murder of Mey Sichan (a Cambodian), which reads as follows:

> Bahawa kamu bersama-sama di antara 1 Januari 2012 hingga 1 April 2012 di alamat No.2190 Taman Asas Murni, Jalan Bukit Minyak, Bukit Mertajam dalam daerah Seberang Perai Tengah, di dalam negeri Pulau Pinang, dalam mencapai niat bersama kamu berdua, telah melakukan bunuh dengan menyebabkan kematian terhadap Mey Sichan No. Passport N0851879 seorang warganegara Kemboja dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan dibaca bersama dengan seksyen 34 Kanun yang sama.

[3] They claimed trial to the charge.

Prosecution Case

[4] The deceased who hailed from Cambodia, was hired by an employment agency called Agensi Pekerjaan Golden Success Sdn Bhd ('the agency'). The agency represented by Lim Cin Cin (PW7) entered into an employment agreement dated 22 July 2011 (P5) with one Lee Leong Hooi (PW3 – the brother-in-law of the second accused), to employ the deceased. Though PW3 executed the agreement as an employer, it was not disputed that the deceased was actually employed by the accused and lived with them.

[5] Since the deceased lived with and worked for the accused, her pay, accommodation and meals were paid and provided for by the second accused.

[6] The accused at the material time operated a hardware business known as Proac Hardware at the ground floor of their shophouse.

[7] In one of PW7's visits to see the deceased, she was informed by the deceased that she was not given enough food.

[8] Having worked for about eight months in the accused's house, the deceased was found dead by PW5, a hospital assistant from Bukit Mertajam Hospital. SP5 went to the accused's shophouse at about 1.50am on 1 April 2012 on being summoned by the second accused. At about 3am the second accused lodged a police report *vide* Bukit Tengah Report No. 3804/2012(P7). The case was investigated by ASP Sariman (SP12).

[9] The deceased's body was removed from the scene to the mortuary at Seberang Jaya Hospital where the post-mortem was subsequently conducted by a Consultant Forensic Pathologists, Dato' Dr Zahari bin Noor (PW6). SP6's findings was that the cause of death was due to acute peritonitis which resulted from perforated gastric ulcer which was also associated with abuse and neglect. SP6 was of the view that the deceased was lacking in food for about a few months. Her weight at the time of her demise was 17kg. The physical abuse, lack of food and neglect were among high stress factors which led to perforated gastric ulcer.

[10] Dr Ramasamy a/l Kandasmy (PW8) the doctor from FOMEMA who examined the deceased on 2 September 2011 gave evidence that when he examined her, the deceased was fit to work. Her weight was 44kg.

Findings At The End Of Prosecution Case

[11] At the end of the prosecution case, the trial judge amended the charge to culpable homicide not amounting to murder under s. 304(a) of the PC. The amended charge reads:

> Bahawa kamu bersama-sama antara 1 Januari 2012 hingga 1 April 2012, No.2190, Taman Asas Murni, Jalan Bukit Minyak, Bukit Mertajam dalam Daerah Seberang Perai Tengah, dalam Negeri Pulau Pinang bagi mencapai niat bersama kamu berdua telah menyebabkan kematian seorang warganegara Kemboja bernama Mey Sichan (No. Passport N0851879) dan dengan itu kamu telah melakukan homisid salah yang tidak terjumlah kepada kesalahan membunuh yang boleh dihukum di bawah seksyen 304(a) Kanun Keseksaan yang dibaca bersama seksyen 34 Kanun yang sama.

[12] Both accused claimed trial to the amended charge.

[13] At this stage, the prosecution had filed an appeal against the amendment of the said charge to one under s. 304(a) of the PC (*vide* Rayuan Jenayah No. P-05-114-04-2013).

A **Defence Case**

[14] The first accused (DW1) opted to give evidence on oath.

[15] The accused were husband and wife. They operated a hardware business known as Proac Harware at a shophouse No. 2190, Taman Asas
B Murni, Jalan Bukit Minyak, Bukit Mertajam.

[16] They did not dispute that the deceased was employed as their maid.

[17] The first accused's defence was that it was not his responsibility to give food and also to render the deceased with medical treatment if she
C suffered illness or injuries as he was occupied with his business of breeding of Arowana fish at Bukit Merah in Taiping, Perak. He went there daily at varying times between 9am to 12noon and returned home between 7pm to 9pm. When he returned home, his hardware shop was closed for business. He did not see the deceased as he went straight to the third floor where he lived with the second accused and DW4 (his mother-in-law) and three
D children. The deceased lived alone on the second floor. By the time he reached home, the deceased had rested in her room.

[18] The second accused (DW2) also gave her evidence on affirmation.

[19] In her defence, she recognised that it was her duty to provide food and
E caused medical treatment to be given to the deceased in the event of the latter's sickness or injuries. She gave food to the deceased daily. Despite that, the deceased still looked thin. She said that she did not take the deceased to see the doctor as the deceased told her that she had no health problems. This happened about two to three days before the deceased's death.

F **[20]** The second accused however admitted that she was negligent for not taking the deceased to see a doctor. She said she was solely liable for the deceased's death and it had nothing to do with her husband (the first accused). She should have taken the deceased to get medical treatment, even without the assistance of the first accused.

G **[21]** She reiterated that she was responsible for the welfare of the deceased. She did not know what was gastric ulcer and peritonitis.

[22] DW4, the mother of the second accused lived together with the accused on the third floor of the shophouse. According to DW4, the deceased
H was given food but she was unable to say whether the deceased finished her food or not. DW4 never witnessed the deceased being beaten or abused. As the deceased was thin, she enquired whether the deceased wanted to see a doctor. The deceased replied in the negative. DW4 also said that the first accused spent his time at the fish breeding farm, whilst the second accused was responsible to give food to the deceased and to take her for medical
I treatment if she was sick or injured.

Finding At The End Of Defence Case

[23] At the end of the defence case, the learned judge held that the accused had failed to raise any reasonable doubt on the prosecution case. Thus the prosecution has proved its case beyond any reasonable doubt under s. 304(a) of the PC. Both were found guilty, convicted and each were sentenced to 24 years imprisonment with effect from date of their arrest (1 April 2012).

[24] Against this decision, both the accused filed an appeal (*vide* Rayuan Jenayah No. P-05-84-04-2014).

The Appeal By The Accused (In Rayuan Jenayah No. P-05-8404-2014)

[25] Before us the accused raised six issues:

(i) the prosecution has failed to prove a *prima facie* case that the accused had:

  (a) Starved the deceased;

  (b) Denied the deceased of medical treatment;

  (c) Physically abused the deceased; and

  (d) Confined the deceased.

(ii) failure to prove common intention on the part of the first accused;

(iii) the evidence and expert opinion of PW8 is of no evidentiary value;

(iv) the learned trial judge misappreciated the evidence of the pathologist (PW6) and the doctor (PW8) who had certified that the deceased was fit to work;

(v) PW7's evidence being hearsay evidence is inadmissible; and

(vi) alternative submission – that the charge ought to be reduced to that under s. 304A of the PC.

No *Prima Facie* Case

[26] On the first issue, learned counsel for both the accused submitted that the prosecution has failed to prove beyond reasonable doubt that the following had inevitably caused the deceased's death:

(a) The accused had starved the deceased;

(b) The accused had denied the deceased of medical treatment;

(c) The accused had physically abused the deceased; and

(d) The accused had confined the deceased.

[27] On the alleged starvation learned counsel submitted that the learned trial judge erred in law and in fact when he found that the deceased was starved, since the pathologist (PW6) failed to rule out that the deceased did

not have any other disease which could have led to the progressive wasting and emaciation of her body. Hence, it cannot be concluded that the deceased's gastric ulcer was caused by her deprivation of food by the accused.

[28] It is also their argument that PW6 ought to have done the following before he could positively conclude that the deceased was lacking food:

(i) satisfy himself that the usual features of starvation was present;

(ii) search for evidence of diseases such as tuberculosis, cancer and diabetes;

(iii) rule out the possibility that a disability such as fracture of the jaw or stricture of oesophagus that could have produced starvation by inability to consume food was present; and

(iv) rule out the possibility of the existence of a starvation aggravating pre-existing disease.

[29] On the failure to provide medical treatment, learned counsel submitted that the learned trial judge failed to appreciate the evidence of the second accused and her mother (DW4) who testified that it was the deceased who refused to visit a doctor despite being asked to do so by the second accused and DW4.

[30] Further, the learned trial judge misperceived the second appellant's evidence stating that she was negligent for not taking the deceased to see a doctor as an admission that she had deprived the deceased of medical treatment. What the second accused meant was that she ought to have insisted on taking the deceased to the doctor despite the latter's refusal.

[31] The learned trial judge also erred in fact and in law when he considered the evidence adduced by the prosecution to the effect that the deceased was confined without considering and evaluating the evidence adduced by the defence which showed that the deceased had the freedom of movement while working for the accused.

Our Findings

Evidence Of Starvation

[32] SP8, the FOMEMA doctor who had seen and examined the deceased on 2 September 2011 had stated that the deceased's weight was 44kg. Upon examination SP8 certified her to be fit to work as a maid.

[33] What was her condition seven months later when seen by PW6 during the post-mortem? The deceased's weight had dropped to 26.1kg, her body mass index (BMI) was 11.9, far below the minimum BMI measurement of 16, which is categorised as severe thinness.

[34] On being shown the photographs of the deceased, exh. P4 (1 and 2) PW8 came out with the following remarks (at p. 85 of AR vol. 1):

> Within a span of 7 months, the drop of about 18kg, this maid has been forcefully deprived of food and water, either locked up somewhere in the room or been forced to do some excessive work. The whole body became very lean, burning fat tissue and muscle tissue, forcing her to loose almost 18kg.

[35] The evidence of PW8 was supported by SP6 who conducted the post-mortem on the deceased. Quoted below is SP6's evidence as ably summarised by the learned trial judge (at p. 18 to 20 of AR vol. 1):

> On external examination, SP6 found that the deceased's weight was 26.1 kg and the height was 148cm. Her cheeks and eyeballs were sunken. She was also dehydrated ...
>
> SP6 also found the wall of the abdomen and chest were very thin, with almost no fatty tissue layer and her muscle was also thin. At the region of stomach pylorus, there was a hole that clearly showed perforation at the surface of the anterior pylorus which was surrounded by pus, inflammation reaction and fibrin. This showed perforated ulcer. A strong foul smell came from abdominal area with intestines stuck at the peritoneum and the inflammation was called acute peritonitis. This acute peritonitis occurred due to gastric ulcer which was ruptured or perforated.
>
> SP6 was of the view that the acute peritonitis occurred at least one week before the deceased's death.
>
> The cause of death was acute peritonitis resulted from perforated gastric ulcer which was also associated with abuses and neglect. SP5 was of the view that the deceased was lacking in food for about a few months.
>
> Based on the physical size of the deceased with her height of 148cm and weight of 26.1kg, clearly showed her Body Mass Index (BMI) was 11.9, meaning far below the minimum BMI measurement of 16, which is categorised as severe thinness.
>
> SP6 also went to opine that the external injuries of the deceased alone was not fatal. Viewed as a whole, the deceased did not get sufficient food, she was neglected and suffered injuries repeatedly over a period of time. Also in view of the old and fresh injuries and multiple injuries combined with abusing injuries, insufficient food, neglect which all added up and led to high stress factor which caused the gastric ulcer and subsequently became perforated. The perforation of the gastric ulcer has led to the onset of acute peritonitis that went untreated for at least a week, thus causing the death.

[36] In his post-mortem report PW6 made a finding that (at p. 396 AR vol. 3):

> Kematian beliau adalah disebabkan oleh 'Acute Peritonitis' iaitu radang atau inflamasi dalam lapisan dan ruang peritoneum akibat daripada 'Gastric Ulcer' yang telah pecah atau 'perforated' dan berkaitan dengan penderaan dan terbiar tanpa makanan dan rawatan iaitu 'Neglect'.

Sebab Kematian:

> Acute peritonitis due to perforated gastric ulcer and associated with abuses and neglect.

[37] PW6 also made the following observation (at p. 74 of AR vol. 1):

> Gambar P4 (11 dan 12) menunjukkan rambut si mati pendek yang tidak sama panjang dan tanda keguguran rambut dan hampir botak pada bahagian-bahagian belakang. lni adalah tanda kurang pemakanan.

[38] Still on the issue of starvation, PW7 (the representative from the maid agency) in her evidence testified that (at p. 80 AR vol. 1):

> Dalam lawatan saya yang kedua kali, Mey Sichan beritahu dia tidak cukup makan. Saya bertanya OKT2 dan diberitahu Mey Sichan curi makan ... Saya tanya Mey Sichan kenapa curi makan kerana dia tidak cukup makan.

[39] Learned counsel submitted this evidence by PW7 is hearsay and inadmissible (the fifth issue raised by the accused). With due respect, we could not agree. This is clearly a direct evidence or complain from the deceased to PW7 and it is admissible under s. 60(1)(b) of the Evidence Act which provides:

> 60. Oral evidence would be direct
>
> (1) Oral evidence shall in all cases whatever be direct, that it is to say:
>
> (a)
>
> (b) if it refers to a fact which would be heard, it must be the evidence of a witness who says he heard it.

[40] PW8 in his evidence had this to say (at p. 5 of rekod rayuan tambahan):

> if the person is hungry, it doesn't have money. A person will even steal food to satisfy his hunger. You won't do the thing like that. Unless you forced a person to be totally out of the food and water. Cannot find a person like this in Malaysia develop country. If you deprived the person forcefully then the person will like this but the normal human nature the mind will say 'I'm hungry, I have to look for food. Either I work for the food or I steal for the food.'

[41] The second accused also admitted under cross-examined that (at p. 136, AR jilid 1):

> Saya setuju Mey Sichan ada mengambil makanan dari tong sampah dan makan.

[42] There must be a reason why the deceased scavenged the leftover food in the rubbish bin. The reasonable inference, in the circumstances of this case, was that the deceased was very hungry and deprived of food, contrary to the defence contention that she was given sufficient food.

[43] We found starvation had been proved which the accused had failed to rebut.

[44] On the issue that the pathologist (PW6) had failed to rule out that the deceased did have any other diseases which could have led to the progressive wasting and emaciation of her, our findings are as follows. PW8, the FOMEMA doctor who had seen and examined the deceased on 2 September 2011 had stated that the deceased weight was 44kg. He had taken the blood and urine samples and the x-ray. The results of the blood and urine sample tests were normal. Chest x-ray normal. Physical examination was normal. Her general condition was good. The deceased never complained of having any medical problem. PW8 then certified her to be fit to work as a maid (at pp. 84 and 85 AR vol. 1).

[45] The post-mortem report by PW6 clearly stated the cause of death was acute peritonitis due to perforated gastric ulcer and associated with abuse and neglect.

[46] No question or suggestion was put by counsel to PW6 about the possibility of the deceased suffering from tuberculosis, cancer or diabetes which could have led to the deceased progressive wasting and emaciation. Defence too did not call their own specialist to contradict or to rebut SP6's evidence.

[47] In *Tan Kim Ho & Anor v. PP* [2009] 3 CLJ 236; [2009] 3 MLJ 151 the Federal Court held that:

> [133] In our adversarial system of justice, the duty of each party is to show that his case is the truth. This is done by him adducing his own witnesses to support his contention. When it is the plaintiff of prosecutor who is adducing the evidence, his witnesses are subject to cross-examination by the defence or the accused person. When a prosecution's witness makes a statement of fact which is disagreed to by the defence it becomes the defence's duty to, in whatever way, put to the plaintiff or prosecution witness that what the witness has said is not true. In addition, he could also use the plaintiff's or prosecution's witnesses to adduce evidence to support his defence and to indicate what his defence is. This he is required to do to enable the plaintiff or prosecution to bring out evidence to disprove what the defence intends to adduce. If the defence does not in any way indicate by cross-examination of those facts, those statements made by the plaintiff's or prosecution's witnesses must be accepted as true. Even if the plaintiff's or prosecution's witness does not say anything relating to the defence case, it is still the duty of the defence to bring out his case during plaintiff's or prosecution's case. In fact this duty to disclose his defence during the prosecution's case is more relevant in criminal cases than in civil. This is particularly so when the plaintiff or prosecution's witness is relevant to the fact in issue. In criminal cases, the prosecution does not know what the defence is going to be, except in alibi, until the defence gave its evidence.

A **Issue Of Medical Treatment**

[48] It is the defence case that, it was the deceased who refused to see a doctor despite being asked to do so by the second accused and DW4.

[49] Under the employment agreement, the employer shall be responsible
B for the medical expenses of the deceased in the event of any injury or general sickness that may arise out of or in the course of the employment.

[50] The second accused's evidence was that she did not take the deceased to see a doctor as the deceased said she had no problem with her health. But looking at the horrific physical condition of the deceased as per photographs
C P3 H, I, 0 and W (at pp. 341, 342, 345, 349 of AR vol. 3) and photographs at P4 (1-4) (at pp. 351-352 of AR vol. 3), the second accused's evidence in this respect is very doubtful. With the full knowledge that the welfare of the deceased is their responsibility, it is beyond apprehension that the accused were still reluctant to bring the deceased to see a doctor whose clinic was
D close by.

[51] PW6 in his evidence testified that (at p. 72 of AR vol. 1):

> Dan pada bahagian 'pylorus' perut terdapat satu lubang yang jelas menunjukkan 'perforation' yang terdapat di permukaan anterior pylorus dan dikelilingi oleh nanah, reaksi inflamasi dan 'fibrin'. lni menunjukkan
E 'perforated gastric ulcer'. Dan bau busuk dalam ruang abdomen warna kehijauan gelap serta melekatnya usus-usus pada pertitoneum dan inflamasi itu dipanggil acute 'peritonitis'. Acute peritonitis ini berlaku kerana gastric ulcer yang pecah atau perforated.
>
> Saya berpendapat 'acute peritonitis' ini telah berlaku sekurang-kurangnya
F satu minggu sebelum kematian.
>
> Dalam keadaan 'acute peritonitis' pergerakan si mati terlalu terhad dan mungkin tidak boleh bergerak langsung. Sekiranya (*sic*), dia akan mengalami kesakitan.'

And at p. 73 he said:

G
> 'Acute peritonitis' sekiranya dirawat memang boleh diselamatkan. Keadaan si mati menunjukkan tiada rawatan semenjak 'perforation' berlaku ke atasnya yang saya anggarkan sekurang-kurangnya seminggu.

[52] The deceased being immobilised and was in a very acute pain and for
H the second accused to say the deceased refused any medical treatment is beyond imagination.

[53] PW6 in his evidence said that (at p. 77 of vol. 1):

> Keadaan badan yang dehydrated serta luka-luka yang tidak dirawat, ini menunjukkan evidence of neglect.

I
[54] Obviously, both the accused had refused the deceased any medical treatment for the reasons only best known to them.

Physical Abuse

[55] On the issue of physical abuse, PW6 had listed down 29 old and new external injuries. Most of the injuries were visible. When PW8 examined the deceased seven months earlier he did not say a word about these multiple injuries. Obviously these injuries were inflicted after the examination by PW8 and during the period of the deceased's employment with the accused.

[56] In his post-mortem report (P6), PW6 had under kesimpulan (at pp. 395 and 396 of AR 3) reported as follows:

> Hasil dari pemeriksaan bedah siasat menunjukkan beliau telah mengalami kecederaan luaran berganda pada badan iaitu luka-luka calar, lebam dan parut yang menunjukkan luka-luka ini adalah yang baru dan lama, yang dialami oleh si mati pada masa dan waktu berlainan. Terdapat juga kesan dari si mati telah terbiar tanpa makanan yang mencukupi sehingga beliau mempunyai tubuh badan yang terlalu kurus dan menunjukkan tanda-tanda 'malnutrition' yang teruk.
>
> Terdapat juga luka-luka lebam yang berbentuk 'tram-line' yang menunjukkan ia dilakukan oleh orang yang menggunakan alat tumpul yang berbentuk lonjong atau memanjang seperti kayu, rotan dan sebagainya.
>
> Saya berpendapat kecederaan luaran dan terbiar tanpa makanan yang mencukupi telah berlaku semenjak beberapa lama mungkin sekurang-kurangnya beberapa bulan.
>
> Berdasarkan kepada ketinggian beliau 1.48 meter dan berat badan yang diukur 26.1kg, jelas menunjukkan Body Mass Index (BMI) beliau adalah 11.9 iaitu jauh lebih rendah daripada 16 BMI iaitu kategori "severe thinness" mengikut klasifikasi "International Classification of adult underweight, overweight and obesity based on BMI" yang digunakan WHO.
>
> Di dalam abdomen si mati didapati beliau telah mengalami 'Acute Peritonitis' iaitu radang atau inflamasi dalam lapisan dan ruang peritoneum akibat daripada 'Gastric Ulcer' yang telah pecah atau 'perforated'. Berdasarkan pada perubahan radang peritoneum, 'adhesions', usus yang melekat pada satu sama lain dan pada lapisan peritoneum serta nanah yang ditemui, kejadian 'Acute peritonitis' ini telah berlaku lebih kurang satu minggu sebelum kematian.
>
> Dalam mengaitkan terbentuknya 'Gastric Ulcer' dengan kesan penderaan dan 'Neglect, saya berpendapat akibat daripada 'stress' kerana penderaan, kekurangan makanan dan 'neglect' yang berlarutan selama sekurang-kurangnya beberapa bulan, menyebabkan 'gastric ulcer' terbentuk dalam perut (gaster) si mati, hingga akhirnya telah pecah atau 'perforated' hingga menyebabkan 'acute peritonitis' sekurang kurangnya seminggu yang lepas, tetapi kerana tiada rawatan atau kerana tidak mendapat rawatan. 'Acute peritonitis' ini akhirnya menyebabkan kematian.

A *Terdapat juga kesan kecederaan yang baru, saya berpendapat kerana si mati telah menderita akibat 'acute peritonitis' yang menyebabkan beliau sudah pasti tidak dapat bergerak kerana kesakitan, beliau masih lagi dipukul atau didera, hingga menyebabkan terdapat luka-luka yang baru pada anggota badan beliau.* (emphasis added by us)

B Kematian beliau adalah disebabkan oleh 'Acute Peritonitis' iaitu radang atau inflamasi dalam lapisan dan ruang peritoneum akibat daripada 'Gastric Ulcer' yang telah pecah atau 'perforated' dan berkaitan dengan penderaan dan terbiar tanpa makanan dan rawatan iaitu 'Neglect'.

Saya juga berpendapat dalam kes ini terdapat elemen penderaan dan 'neglect'.

C

Sebab Kematian: Acute Peritonitis due to perforated gastric ulcer and association with abuses and neglect.

[57] We found, without doubt that the deceased had been badly abused by both of the accused.

D

Issue Of Confinement

[58] This issue could be gathered from PW4's and PW6's evidences.

[59] Chung Kim Leng (PW4), the clerk who works in Proac Hardware, gave evidence that she was aware that the deceased was employed as a maid.
E The deceased's job was to clean the office and to assist to fetch the trade items during busy hours. One day, the glass of the office was broken. PW4 learned from the second accused that it was the deceased who broke the said glass to enter the office to steal things therein. Since then PW4 did not see the deceased. When PW4 enquired of the deceased whereabouts, the second
F accused told her that she wanted to send the deceased back. Here, the deceased was already being confined by the accused.

[60] It had been proved that the deceased was in a worst condition towards the end of her life. She could not even move. About her condition PW6 had testified that (at p. 72 of AR vol. 1):

G

Saya berpendapat keadaan kurang makan si mati ini telah berlaku mungkin beberapa bulan.

Dalam keadaan acute peritonitis pergerakan si mati terlalu terhad dan mungkin tidak boleh bergerak langsung. Sekiranya (*sic*), dia akan mengalami kesakitan.

H

[61] In his post-mortem report (P6 at p. 396 of AR 3), PW6 concluded:

Terdapat juga kesan kecederaan yang baru, saya berpendapat si mati telah menderita akibat 'acute peritonitis' yang menyebabkan beliau sudah pasti tidak dapat bergerak kerana kesakitan, beliau masih lagi dipukul atau
I didera, hingga menyebabkan terdapat luka-luka yang baru pada anggota beliau.

[62] Obviously the second accused was lying in her police report (P7, at p. 397 AR vol. 3) when she reported that on 31 March 2012 the deceased was still taking her bath when she sent up her dinner to her at about 8pm.

[63] By not sending the immobilised deceased for medical treatment, it is tantamount to illegal confinement.

The Second Issue – Common Intention

[64] The defence of the first accused was that, at all times he was away at his fish breeding ponds in Bukit Merah, Taiping. The first accused had shifted the entire criminal culpability to the second accused. Obviously the first accused has attempted to distance himself from the deceased's predicament.

[65] The first accused's evidence was that every morning before going to the fish farm, he opened up the hardware shop before the second accused took over at 9am. He went to his farm at varying times between 9am to 12noon and returned home 7pm to 9pm. However his evidence had been contradicted by PW3, his fish farm business partner, who under cross-examination said (at p. 58 AR vol. 1):

> Dalam seminggu, OKT 1 datang ke tempat menternak ikan 4 hingga 5 hari.

[66] On this issue the learned trial judge had this to say (at p. 32 of AR vol. 1):

> It is undeniable that the evidence adduced showed the deceased was employed as a maid or servant and OKT1 and OKT2 were her employers or masters. The deceased was under their care and it was their duty to look after her well being. OKT 1 and OKT2 were under a duty not to ill-treat her and to give her sufficient food (including drink), basic amenities and to provide medical treatment when the need arises. Is there any other person who has placed the deceased into such a state of affairs of no food, neglect and abuse? For the deceased to fall into that predicament and condition, it must be through a gradual process, perhaps through weeks or months – and certainly it does not happen in a snap of a finger.
>
> Based on the evidence proffered by the prosecution, both direct and circumstantial, there is only one irresistible conclusion, that is, in furtherance of their common intention under s. 34 of the Penal Code, the mutual duties between OKT1 dan OKT2 being husband and wife has caused the death of Mey Sichan, deceased arising from a contract/ agreement or undertaking. Even without the existence of the Agreement, P5, OKT1 and OKT2 were under the duty as the employers or masters to look after the welfare of their maid, or servant, the deceased.

[67] Further, at pp. 37 and 38 the trial judge ruled that:

> OKT1 and OKT2 were husband and wife who lived under the same roof with the deceased for the last 8 months before her death, it was highly improbable for OKT1 during that period of 8 months, not to notice and

realised the deceased's body had gradually turn cachectic, unless OKT1 deliberately chose to shut his eyes to the obvious. In *Roslan bin Sabu @ Omar v. PP* [2006] 4 AMR 772 James Foong JCA said:

> This is what Professor Glanville Williams in his text *"Textbook on Criminal Law"* at p 125 called "wilful blindness". This is meant to deal with those whose philosophy is: "where ignorance is bliss, "tis folly to be wise". To argue away inconvenient truths is a human failing, If a person deliberately "shuts his eyes" to the obvious, because he "doesn't want to know", he is taken to know.

[68] We were in the full agreement with the trial judge on this issue.

[69] It is true that the second accused was in charge of the household and played a much more active role in it than it did the first accused. However on evidence, since the first accused was in the household every day, he must be aware of the deceased's condition. The evidence established that the first accused was aware of and participated in the deceased's mistreatment and confinement.

Third Issue – Expert Opinion Of PW8

[70] It is submitted that the trial judge had erred when he took into account groundless expert opinion of PW8 who concluded that the deceased was forcefully deprived of food and water and was either confined or tasked with excessive amount of work as the reason of her drastic weight loss.

[71] We were of the opinion that it is not a bare expression of PW8's opinion. He had examined the deceased previously. He had taken the deceased's blood and urine sample and x-ray, the results of which were all normal. Her condition was good then. Eight months later, she was in a such a horrific condition. His opinion is relevant to the issue. Furthermore, as his opinion had never been contradicted by other defence witness or expert, therefore his opinion could be accepted.

The Appeal By The Prosecution

[72] In the appeal by the prosecution against the reduction of the charge to one under s. 304(a) of the PC, the prosecution raised three issues before us:

(i) the learned trial judge erred in amending the charge from s. 302 to s. 304(a) of the PC;

(ii) the learned trial judge failed to apply the law that death may be caused 'by doing an act' such as starving; and

(iii) the learned trial judge failed to consider s. 32 of the PC which provides that words referring to acts done include illegal omissions.

[73] The learned trial judge reduced the charge to one under s. 304(a) of the PC at the end of the prosecution case, for the following reasons:

> At the end of the prosecution's case, I found that the prosecution has not succeeded in establishing a *prima facie* case of murder under s. 302 of the Penal Code. However, upon maximum evaluation of the prosecution evidences, as mandated in *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734, I found that the prosecution has succeeded in establishing a *prima facie* case of culpable homicide not amounting to murder as the deceased's death was the likely result from OKT1 and OKT2's prolonged or repeated omission as opposed to the probable result of her death. I find support in the Federal Court case *PP v. Megat Shahrizat Megat Shahrur* [2011] 8 CLJ 893, wherein the case of *Tham Kai Yau @ Ors v. PP* [1976] 1 LNS 159 was cited. It was held that whether the offence is culpable homicide or murder depends upon the degree of risk to human life. If death is the likely result, it is culpable homicide, if death is the most probable result, it is murder. See illustration (d) of s. 300 of the Penal Code.

[74] Learned counsel before the trial judge argued that neglect to give food and drink is an omission which is inconsistent with the words 'act done' as found in all of the limbs in s. 300. *The Law of Crimes* by Ratanlal and Dhirajlal's, 24th edn., vol. 2 at p. 1240 states as follows:

> Act whether includes 'omission' - one may suffer death by the omission on the part of someone else *in loco parentes*. If there is a duty to act, an omission to perform duty resulting in death of one under care would entail liability for culpable homicide not amounting to murder. The important limitation is that there can be no liability for an omission in the absence of a duty to act. Such duties are duties of parents in respect of children, duty of Jail Superintendent in respect of prisoners, mutual duties between husband and wife and duties arising out of contract of undertaking.

[75] To discuss the issue at hand, we wish to reproduce below the provisions under s. 32 and s. 43 of the PC:

> 32. Words referring to acts include illegal omissions.
>
> In every part of this Code, except where a contrary intention appears from the context, words which refer to acts done extend also to illegal omissions.
>
> 43. "Illegal", "unlawful" and "legally bound to do".
>
> The words "illegal" or "unlawful" is applicable to everything which is an offence, or which is prohibited by law, or which furnishes ground for a civil action.
>
> And in respect of the word "illegal", a person is said to be "legally bound to do" whatever it is illegal in him to omit.

[76] The deceased was employed as a domestic maid *vide* the agreement dated 27 February 2011 (exh. P5). Under the agreement it was the responsibility of the appellants to provide food, accommodation and medical

A expenses in the event of any injury or general sickness that may arise out of or in the course of the employment and the maid had enough sleep (at least eight hours) and rest time every day.

[77] The distinction between an action and an omission is often one of semantics.

B

[78] Death may be caused by 'doing an act' such as killing, shooting, poisoning, starving etc. Starving of the deceased could be seen as an action (withholding adequate nutrition from her), or as an omission (failing to give her adequate nutrition). The availability of inference that a person intended or foresaw a certain result as a probable consequence of conduct will depend C on the nature of that conduct and not its categorisation as an act or omission: see *R v. EB* (2011) OJ No. 1042 (Ontario Court of Appeal).

[79] Under the employment agreement (P5) it was both the accused's duty to provide sufficient food, not to neglect or abused her and to provide her D with medical treatment.

[80] The accused's conduct consisted of multifaceted, long term mistreatment of the deceased combined with the failure to seek medical assistance for the deceased in the final days or weeks of her life when her dire medical condition was obvious. Their continued abuse and neglect of the E deceased was the obvious and inevitable consequence of her mistreatment. They must be taken to know that they are doing an act imminently dangerous to the life of the deceased and that the probable result of their act will cause the deceased's death.

[81] The other relevant law to this issue is s. 36 of the PC which provides: F

> 36. Effect caused partly by act and partly by omission.
>
> Wherever the causing of the certain effect, or an attempt to cause that effect, by an act or by an omission, is an offence, it is to be understood that the causing of that effect partly by an act and partly by an omission is the same offence.

G

[82] The illustration to s. 36 of the PC is clear on this issue:

> A intentionally causes Z's death partly by illegal omitting to Z's food, and partly by beating Z. A has committed murder.

[83] The provision of cl. 4 of s. 300 of the PC had been discussed by the H Federal Court in the case of *Yeap Boon Hai v. PP* [2010] 2 CLJ 405:

> [21] Ratanlal & Dhirajlal's *Law of Crimes*, a commentary of the Indian Penal Code, 1860, 26th Ed. writing on cl. 4 of s. 300 which is similar to s. 300 of our Penal Code stated:
>
> I Clause 4 applies to a case of dangerous action without an intention to cause specific bodily injury to any person. The distinction between the first three clauses and the last clause is that whether

> in the former there is an intention to kill or to cause bodily injury, in the latter there is no such intention. It is designed to cover cases in which the agent not intending to cause death or to cause such bodily injury as is likely to cause death, has, nevertheless, caused death by an act knowing that it is so imminently dangerous that in all probability it will cause death.

[22] In *Kalegura Padma Rao & Anor v. The State of A.P.* AIR 2007 SC 1299, at p. 1305, the Supreme Court observed:

> It will be sufficient to say that clause (4) of s. 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general as distinguished from a particular person or persons being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid.

[84] It is a clear case that the accused had failed to perform their legal duty to provide the basic necessities of life, including food and adequate medical care. The abuse and neglect, which occurred over a number of months on daily basis and included starvation and the failure to attend to basic medical and hygienic needs, compelled the conclusion that the accused knew that their abuse and neglect of the deceased had cause her bodily harm, and without medical intervention, which they never provide, deceased's death was imminently probable.

[85] PW6 testified that in the weeks, if not months before her death, the deceased would have been so weak as to enable to interact with her environment in a meaningful way. Despite that condition, the accused did nothing to get her any medical keep, though there was evidence to show that there was a medical clinic a few meters away from their house. They instead continued the abuse and neglect.

[86] On the evidence, it would appear the accused only sought medical assistance at about 1am on 1 April 2012 when the deceased was very near death or perhaps already dead.

Conclusion

[87] The medical evidence established beyond doubt that the accused's neglect and mistreatment of the deceased was a factual cause of her death. She died a slow and painful death through protracted abuse and starvation. The nature and extent of their conduct put them in a close to the worst group of offenders, unyielding inhumanity and degradation. The photographs of the deceased as per exhs. P3H, I and P4(1-4) (at pp. 341, 342, 345, 349, 351 and 352 of AR vol. 3) speaks a thousand words of her horrific suffering before her untimely death.

[88] The accused's conduct was a nature that readily permitted the inference that the accused knew their conduct, was so imminently dangerous and would probably bring about the deceased's death and yet they chose to persist in the conduct.

[89] Given the accused's uncontested legal duty to provide the deceased with necessaries of life, the accused's through their course of conduct, had caused the deceased's death by the unlawful act and thereby committed a murder.

[90] For the above reasons, we unanimously allowed the appeal by the prosecution and dismissed the appeal by the accused. We set aside the order of the learned trial judge and convicted them under s. 302 of the PC and sentenced them to death.